

# **News You Can Use for CERCLA Contaminated Properties**

**Susan E. Bromm**  
**Director**

**Office of Site Remediation Enforcement**  
**U.S. Environmental Protection Agency**

# The Small Business Liability Relief and Brownfields Revitalization Act

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- ❑ Significant amendments to CERCLA – but not comprehensive Superfund reform
- ❑ Changes to encourage responsible cleanup and re-use of contaminated properties
- ❑ Targeted at some of the most inequitable consequences of Superfund's broad liability scheme
- ❑ In several cases, Act largely codified existing EPA policy

# Overview of News You Can Use

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- ❑ New De Micromis Guidance
- ❑ Bona Fide Prospective Purchasers
- ❑ Common Elements – institutional controls, reasonable steps
- ❑ All Appropriate Inquiry
- ❑ Eligible Response Site
- ❑ Delegations
- ❑ Bromm's Top Ten List

# Policy on Exempt De Micromis and Non-Exempt De Micromis Parties

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- ❑ **Q:** How many non-exempt de micromis settlements does the Agency anticipate each year?
  
- ❑ **A:** In the last several years we have not needed to enter into any de micromis settlements. Past policies and Administrative Reforms have been effective in deterring third party lawsuits against parties contributing miniscule amounts of hazardous waste to a Superfund site. So, we hope to continue the trend of zero settlements per year for non-exempt de micromis parties

# Policy on Exempt De Micromis and Non-Exempt De Micromis Parties

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- ❑ **Q:** The statutory exemption applies only to de micromis parties at NPL sites; what do you plan to do for non-NPL sites?
  
- ❑ **A:** EPA plans to exercise its enforcement discretion not to pursue parties at non-NPL sites who would otherwise meet the §107(o) exemption. If these non-exempt de micromis parties are threatened by litigation, however, EPA would consider a zero dollar administrative settlement to protect them.

# Policy on Exempt De Micromis and Non-Exempt De Micromis Parties

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- ❑ **Q:** It appears that old 0.002 percentage presumptive cut-off is not listed in the new policy.
  
- ❑ **A:** That is correct. The policy mirrors the numerical cut-offs in the statute (e.g., 110/200 gallons) as a starting point. Regions have the flexibility to consider higher amounts on a site specific basis.

# Bona Fide Prospective Purchasers

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- ❑ **Q:** Under what circumstances would EPA do Prospective Purchaser Agreements (PPAs) now?
  
- ❑ **A:** We believe the law is largely self-implementing but there are a few limited circumstances where a PPA might be appropriate if it serves the public interest. These circumstances are set out in your materials. EPA is committed to removing liability barriers to redevelopment of property where it is appropriate to do so

# Windfall Lien

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- ❑ EPA intends to issue windfall lien guidance with a model resolution agreement in the near future.



# “Common Elements” Guidance

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- ❑ Contiguous Property Owners (CPOs), Bona Fide Prospective Purchasers (BFPPs), & Innocent Landowners (ILOs) must meet certain threshold criteria and continuing obligations in order to qualify for the “landowner liability protections.”
- ❑ This is an interim guidance, and may be revised as EPA gains experience in implementing the Brownfields Amendments.

# “Common Elements” Guidance

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- ❑ **Q:** Who bears the burden of proof that a person qualifies for the landowner liability protections?
  
- ❑ **A:** The party claiming the protection bears the burden of proof that it meets the conditions of the applicable liability protection.

# “Common Elements” Guidance

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- ❑ **Q:** What are the threshold criteria to qualify for a landowner liability protection?
  
- ❑ **A:** BFPPs, CPOs and ILOs must meet the threshold criteria of performing “all appropriate inquiry” **on or before** acquiring the property. Contiguous property owners and bona fide prospective purchasers must also demonstrate they are not potentially liable or affiliated with any other person that is potentially liable for response costs at the property.

# “Common Elements” Guidance

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❑ **Q:** Do Innocent Landowners have to meet any other criteria?

❑ **A:** Yes, ILOs must show that the release or threatened release is by someone not in an employment, agency, or contractual relationship with the innocent landowner.

# “Common Elements” Guidance

## Institutional Controls

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- ❑ **Q:** If the institutional controls or land use restrictions were not in place at the time the person purchased the property, must the person still comply with the restrictions and implement the controls?
  
- ❑ **A:** Yes, these are ongoing obligations. Furthermore, a person may not impede the effectiveness or integrity of any institutional control employed in connection with a response action. Impeding does not require a physical disturbance or disruption of the land.

# “Common Elements” Guidance

## “Reasonable Steps”

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- ❑ **Q:** What does EPA expect here?
  
- ❑ **A:** EPA expects landowners to act responsibly if they find hazardous substances on their property. EPA is balancing Congress’ objectives of protecting certain landowners from CERCLA liability with ensuring protection of human health and the environment. EPA believes the pre-existing “due care” case law provides a good reference point for evaluating reasonable steps. EPA is not looking for a full blown CERCLA response as a reasonable step.

# “Common Elements” Guidance

## “Reasonable Steps”

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- ❑ **Q:** Is the reasonable steps language in the guidance the same for all three landowner provisions?
- ❑ **A:** Basically yes. But because of the facts surrounding a BFPP purchase, a BFPP may have greater reasonable steps obligations than the others. The pre-purchase “appropriate inquiry”\* by a BFPP will most likely have informed the BFPP as to the nature and extent of contamination on the property and what might be reasonable steps regarding the contamination.

\*Remember all BFPPs, CPOs and ILOs must do “all appropriate inquiry”

# “Common Elements” Guidance

## “Reasonable Steps”

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- ❑ **Q:** Do the landowner liability protections apply to subsequent contamination on the property?
- ❑ **A:** No, the required reasonable steps only relate to responding to contamination for which the exempted landowner is not responsible. Activities on the property subsequent to purchase that result in new contamination can give rise to full CERCLA liability.



# “Common Elements” Guidance

## “Reasonable Steps”

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- ❑ **Q:** If a landowner discovers a previously unknown release of a hazardous substance from a source on her property, must she remediate the release?
- ❑ **A:** Provided the landowner is not otherwise liable for the release from the source, she should take some affirmative steps to “stop the continuing release.” EPA would not, absent unusual circumstances, look to her for performance of complete remedial measures.

# “Common Elements” Guidance

## “Reasonable Steps”

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- ❑ **Q:** If a new purchaser agrees to assume the obligations of a prior owner PRP, as defined in an EPA order or consent decree, will compliance with those obligations satisfy the reasonable steps?
- ❑ **A:** Yes, in most cases, if the order or consent decree comprehensively addresses the obligations of the prior owner through completion of the remedy. Note that not all orders or consent decrees identify obligations through completion of the remedy and some have open-ended cleanup obligations.

# “Common Elements” Guidance

## “All Appropriate Inquiry”

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- ❑ **Q:** What is the standard to be applied for “all appropriate inquiry?”
- ❑ **A:** For property purchased before 5/31/97 there is a statutory narrative standard – commonly known information about the property, value of the property if clean, ability of the defendant to detect contamination, and other similar criteria.
- ❑ For property purchased after that date, use the 1997 ASTM Phase I Environmental Assessment standards. The new legislation provides that EPA is required to issue all appropriate inquiry standards by January 11, 2004.

# Eligible Response Sites

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- ❑ “Eligible Response Site” defines sites where CERCLA enforcement bar may apply.
- ❑ Certain sites in the Superfund site assessment process are excluded from the definition of eligible response site, thus the enforcement bar does not apply at such sites.

# Eligible Response Sites

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- ❑ **Q.** At what point in the Superfund process should a determination be made to exclude a site from the definition of an eligible response site?
  
- ❑ **A.** There is a strong preference for making the decision after an SI; however, we may make pre-SI decision if the nature and quality of the information allow for a decision with a high level of confidence (e.g., data indicating human exposure)

# Eligible Response Sites

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- ❑ **Q:** When will you make a No Further Federal Action determination?
- ❑ **A:** This will generally happen at two points in the assessment process
  - ❑ At the “No Further Remedial Action Planned” stage – if consultations with removal and legal enforcement programs reveal no potential or ongoing removal, enforcement, or cost recovery actions, or if the site is referred to removal or there are potential or ongoing enforcement or cost recovery actions,
  - ❑ At the “Archive” stage

# Eligible Response Sites

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- ❑ **Q:** What if the site is already past the SI stage?
  
- ❑ **A:** While we use the same basis for excluding these sites, the process is different. The Regions should make a single determination for a group of currently active CERCLIS sites that warrant exclusion. The goal is to exclude sites that would have been excluded if the statute was in place at the time the original assessment decisions were made.

# Eligible Response Sites

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- ❑ **Q:** Will this initial post SI list be exclusive?
  
- ❑ **A:** No, the Region may later discover sites in the current CERCLIS universe that should have been excluded. Making the initial determination does not preclude the Region from later excluding sites that the Region could have excluded under the initial determination.



# Delegations

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- ❑ EPA is considering how to delegate internally its authority to exercise the enforcement and liability-related provisions of the amendments.
- ❑ No decisions to be made until we have a signed Executive Order.
- ❑ EPA expects to be consistent with earlier CERCLA delegations and generally to delegate most of its authority to the Regions while retaining a HQ concurrence role in a few instances.

# Bromm's Top Ten Helpful Hints

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1. In many cases, RCRA TSDs can be “brownfields,” eligible for grants and the enforcement bar.
2. All three landowners seeking landowner liability protection (ILO, BFPP, and CPO) must perform “all appropriate inquiry.” Failure to do so defeats the protection.
3. For the first time, a party (i.e., a BFPP) can purchase with knowledge of contamination and not be subject to CERCLA liability.

# Top Ten continued

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4. ILOs and CPOs cannot purchase with knowledge of contamination and get liability protection. A CPO, may, however, still qualify as a BFPP.
5. EPA does not believe that reasonable steps typically include complete remedial measures. The ILO “due care” case law provides a good reference point for evaluating “reasonable’ steps.”

# Top Ten continued

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5. EPA believes that the legislation essentially does away with the need for most Prospective Purchases Agreements.
6. EPA will be issuing a model document for resolving windfall liens under §107(r) and issuing a guidance defining generally where it will and will not pursue windfall liens.
7. Generally, a determination to exclude an eligible response site (once it enters the CERCLIS universe) will be made after an SI is conducted,

# Top Ten continued

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9. EPA will make an affirmative decision on when CERCLIS sites are no longer eligible response sites and will make this information available to the public through CERCLIS and other means.
10. All grants guidance can be found at [www.epa.gov/brownfields](http://www.epa.gov/brownfields). All liability guidance can be found at [www.epa.gov/compliance/resources/policies/cleanup/index.html](http://www.epa.gov/compliance/resources/policies/cleanup/index.html)